ANG HAN CHAI & ANOR

v.

TING PEK SUI

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[SUIT NO: 21 OF 1992]
17 APRIL 1998

CIVIL PROCEDURE: *Affidavits - Filing and service - Application for extension of time to file and serve affidavit - Considerations - Failure to file affidavit opposing application to extend time - Whether amounts to admission of facts asserted in affidavit sought to be filed and served - Rules of the High Court 1980, O. 32 r. 13(2)*

This was an application by the defendant seeking an extension of time to file and serve an affidavit in support of his earlier application to set aside a judgment of default entered against him. The plaintiffs did not file an affidavit opposing this application. Instead, they argued that the 14 days time period to file and serve affidavits as prescribed by O. 32 r. 13(2)(a) of the Rules of the High Court 1980 ('the RHC') had expired.

Held:

[1] The failure of the plaintiffs to file an affidavit opposing this application to extend time cannot be treated as an admission of the facts asserted in that affidavit of the defendant which is now sought to be filed and served. This is because the matters averred in that affidavit contains no allegation of fact for the purpose of this application for an extension of time. Further, the objection raised by the plaintiffs is on a point of law and therefore no affidavit evidence is required.

[2] Pursuant to O. 32 r. 13(2)(a) of the RHC, affidavits must be served within 14 days from the date of filing of an application. The affidavit in question was served well out of time and there has even been a delay in applying for an extension of time. No reasons were given by the defendant to explain the delay in respect of the filing and service of the affidavit. Further, the defendant failed to adduce any material on which the court can exercise its discretion in his favour.

[Application dismissed with costs.]

Case(s) referred to:
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2 ***(cit)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(cit)***
Ong Guan Teck & Ors v. Hijjas Kasturi [1982] 1 CLJ 31 ***(refd)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5(1), O. 32 r. 13(2)(a)

For the plaintiffs - Wong Sing Nang; M/s Wong, Orlando Chua & Co
For the defendant - Cecil Lau; M/s Kadir, Wong Lin & Co

Reported by Ling Hea Hoon

JUDGMENT

Tee Ah Sing J:

This is an application by summons in chambers under O. 3 r. 5 and O. 32 r. 13(2)(a) of the Rules of the High Court 1980 ("the RHC") by the defendant for the following orders:-

(i) That the time to file and serve the affidavit of Ting Pek Sui affirmed on 1 December 1997 be extended to one week from the date of this order.

(ii) That in the alternative, the service of the affidavit of Ting Pek Sui affirmed on 1 December 1997 served on the plaintiff's advocates on 2 December 1997 be deemed as having been validly, regularly and properly filed and served.

(iii) That the costs of this application be costs in the cause.

This application is supported by the affidavit of Ting Pek Sui affirmed on 24 December 1997. The pertinent parts of the affidavit read as follows:

1. I am the Defendant herein and have the knowledge and authority to depose to the matters herein.

2. I crave leave to refer to my affidavit affirmed on the 22nd day of January, 1997 in support of the Summons In Chambers (Order 32 Rule 6, Order 13 Rule 1)(hereinafter referred to as "Ting's affidavit").

3. I crave leave to refer to my affidavit affirmed on the 1st day of December, 1997 (hereinafter referred to as "Ting's affidavit II").

4. With reference to paragraph 2 of Ting's affidavit, I aver that I came to know about the said default judgment against me, exh. TPS-2 of Ting's affidavit in early January 1997 when the same was exhibited as an exhibit. I requested my solicitor Messrs. Kadir, Wong, Lin & Co., to take up an application to set aside the said default judgment.

5. At the time of taking up the application, I was advised that the said judgment exhibit TPS-2 was a nullity as although the 1st plaintiff passed away in 1988, the 1st plaintiff, the deceased commenced this action in 1992 which render the whole suit a nullity.

6. I am advised that to date, my solicitor had not received any affidavit in opposition to Ting's affidavit.

7. That my solicitor advise me that on further perusal of the said judgment exh. TPS-2, I was advised that the said judgment is irregular and the defendant is entitled to have it set aside *ex debito justitiae* as the said judgment was entered without leave from the court which is contrary to Order 13 Rule 6(1), Order 19 rule 7(1) and Order 81 Rule 1 and 2 of the RHC 1980.

8. I instructed my solicitor to prepare another affidavit to the effect. I am advise that on the 28th November, 1997 and on 2nd day of December, 1997, before service of the said affidavit, Messrs. Kadir, Wong, Lin & Co., did inquire with the plaintiff's solicitor whether they have any objection to the affidavit, copies of the letter are shown to me and is annexed hereto and marked "TPS-l" and "TPS-2".

9. I am advise that as the Plaintiff's solicitor is objecting to the use of the affidavit, leave is required from this court to file and serve the affidavit. I urge this court to exercise its discretion to allow me to file and serve the affidavit to determine the real issues in controversy between the parties and to bring to the court's attention of the irregularity of the said judgment.

10. I am advise that any prejudice suffered by the plaintiff (if any) can be adequately compensated by costs.

The learned counsel for the defendant submitted that O. 3 r. 5 of the RHC provides a discretion to make an order for the extension of time to file affidavit provided it is shown by the defendant the extension does not cause any real risk of prejudice to his opponent for which an award of costs cannot compensate.

The defendant had deposed in his affidavit that his counsel or himself did not receive any affidavit in opposition to his application for extension of time. Failure to file a affidavit in opposition is usually treated as an admission by him of the facts so asserted. In support the cases of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 and *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] 1 MLJ 382 were cited.

The learned counsel for the plaintiffs submitted that under O. 32 r. 13(2)(a) of the RHC, all the affidavits must be filed and served on the other party within 14 days allowed by the rule when the other party's affidavit has been served. In support, the case of *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 was cited. He also submitted that O. 32 r. 13(2)(a) of the RHC is on point of law and the plaintiffs do not need to swear an affidavit to reply to the defendant's allegation.

The defendant has not explained why there was such a delay and there is no merits in the application for extension of time.

The learned counsel for the defendant in reply submitted that O. 3 r. 5(1) of the RHC did not touch on the merits of the case and the opponent could not now argue on the merits or delay by the submission from the bar. Any challenge as to merits or delay must be sworn in the affidavit.

I shall now deal with the issues raised.

In this case the failure of the plaintiffs to file in an affidavit in opposition to the application for extension of time cannot be treated as an admission of the facts so asserted as the matters averred in Ting's second affidavit contains no allegation of fact for the purpose of the application for extension of time which the plaintiffs need reply to. Further, the objection raised is on the point of law and therefore no affidavit evidence is required. So the cases of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 and *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] 1 MLJ 382 cited by the defendant are not applicable to the facts of this application.

The application of the defendant to set aside judgment in default of appearance with the affidavit of Ting Pek Sui affirmed on 22 January 1997 ("Ting's 1st affidavit") in support was filed on 24 January 1997. Ting's 1st affidavit was served on the plaintiffs on 24 January 1997. However, another affidavit was affirmed by Ting Pek Sui on 1 December 1997 ("Ting's 2nd affidavit").

Order 32 r. 13(2)(a) of the RHC reads as follows:

> (2) Save as otherwise provided in these rules -
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application.

Therefore for the purposes of O. 32 r. 13(2)(a) of the RHC, the affidavits must be served on the plaintiffs within 14 days from 24 January 1997. Ting's 1st affidavit was served within the 14 days. However, Ting's 2nd affidavit was served outside the 14 days. Ting's 2nd affidavit was served about ten months

out of time. The application for extension of time was filed on 31 December 1997. There has been a delay of about 11 months in making the application for extension of time.

Order 3 r. 5(1) of the RHC reads as follows:

> (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.

In *Ong Guan Teck & Ors v. Hijjas Kasturi* [1982] 1 MLJ 105 His Lordship Hashim Yeop Abdullah Sani J (as he then was) at p. 106 said:

> It is trite law that the court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period.
>
> In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time.

Now, what are the circumstances of this case to enable the court to exercise its discretion?

In the affidavit of Ting Pek Sui affirmed on 24 December 1997 no reasons were given to explain the delay in respect of the filing and service of Ting's 2nd affidavit. The defendant has not adduced any material on which the court can exercise its discretion in favour of the defendant. As such, I find that the defendant has failed to show sufficient grounds upon which the court could grant leave to extend time.

In the circumstances, I dismiss the summons in chambers with costs to be taxed unless agreed.